

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

DAVID PARNELL)
)
Plaintiff,)
)
v.) **Civil Action No. 04-4072-JAR**
)
SCHMIDT & ASSOCIATES, INC., NEW)
YORK LIFE INSURANCE COMPANY,)
and NYLIFE SECURITIES, INC.)
)
Defendants.)

)

Plaintiff, David Parnell, filed a petition in the Douglas County District Court on March 16, 2004, alleging violations of the Kansas Consumer Protection Act (KCPA), fraud, negligent misrepresentation, and breach of fiduciary duty. The case was removed to this Court upon request of defendants. Defendants filed a Motion to Dismiss plaintiff's Petition on July 23, 2004, in lieu of an Answer. On August 12, 2004, plaintiff filed his response to defendants' Motion to Dismiss and a Motion to Amend his Complaint (Doc. 7). The Honorable K. Gary Sebelius granted plaintiff's Motion to Amend on August 30, 2004 and plaintiff filed his Amended Complaint on August 31, 2004 (Doc. 11).

This matter is before the Court on defendants' Motion to Dismiss (Doc. 3) which was filed prior to plaintiff amending his Complaint. Defendants seek dismissal of plaintiff's breach of fiduciary duty, KCPA and fraud claims. In addition, defendants request an order for a more definite statement as to plaintiff's negligent misrepresentation claim. For the reasons stated

below, defendants' motion is denied.

DISCUSSION

In their Motion to Dismiss, defendants ask this Court to dismiss plaintiff's breach of fiduciary duty claim (Count IV) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Defendants also seek dismissal of plaintiff's KCPA (Count I) and fraud (Count II) claims for failure to plead the claims with particularity as required by Fed. R. Civ. P. 9(b). In addition, defendants request an order for a more definite statement regarding plaintiff's negligent misrepresentation claim (Count III) pursuant to Fed. R. Civ. P. 12(e). The Court addresses each of defendants' arguments in turn.

A. Failure to State a Claim - Breach of Fiduciary Duty

Defendants allege that plaintiff's breach of fiduciary duty claim fails to state a cause of action and seek dismissal. The court will dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him to relief.¹ The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations.² In addition, all reasonable inferences are viewed in favor of the plaintiff.³ The issue in resolving such a motion is not whether the plaintiff will ultimately prevail, but whether he is entitled to

¹*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998).

²*Maher*, 144 F.3d at 1304.

³*Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir. 1998).

offer evidence to support the claims.⁴

Specifically, defendants allege that plaintiff has failed to establish the existence of a fiduciary relationship. Kansas law recognizes two types of fiduciary relationships: “(1) those specifically created by contract . . . and (2) those implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transactions.”⁵ The determination of whether or not an implied fiduciary relationship exists depends on the facts and circumstances of each individual case.⁶ The concept of a fiduciary duty is thus an equitable one and no precise definition may be given.⁷ Nevertheless, it is generally said that the term "fiduciary relationship" refers to any relationship of blood, business, friendship or association in which one of the parties places special trust and confidence in the other.⁸ It exists in cases where there has been a special confidence placed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one placing the confidence.⁹

Plaintiff has alleged that he placed special trust and confidence in John Schmidt, acting as plaintiff's agent, in regards to the advising and purchase of securities. Plaintiff further alleges that this agency relationship created a fiduciary duty and that Schmidt, as a fiduciary, was

⁴*In re Sprint Corp. Sec. Litig.*, 232 F. Supp. 2d 1193, 1213 (D. Kan. 2002) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984)).

⁵*Dennison State Bank v. Madeira*, 230 Kan. 684, 691, 640 P.2d 1235 (1982).

⁶*Id.* (quoting *Curtis v. Freden*, 224 Kan. 646, 651, 585 P.2d 993 (1978)).

⁷*Id.*

⁸PIK-Civil 3d 125.01.

⁹*Id.*

required to act in good faith and with due regard to plaintiff's best interests and failed to do so. In their motion to dismiss, defendants emphasize the lack of an agreement establishing a fiduciary relationship. However, a fiduciary relationship may be created by express agreement *or* may be implied based upon the conduct of the parties. Taking all of plaintiff's factual allegations as true, plaintiff has sufficiently alleged an implied fiduciary relationship so as to entitle him to present evidence to support the claim. Defendants' Motion to Dismiss Count IV is denied.

B. Failure to Plead With Particularity - KCPA and Fraud

Defendants contend that Counts I and II of plaintiff's Complaint should be dismissed for failure to satisfy Fed. R. Civ. P. 9(b), which requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Allegations of fraud must "set forth the time, place, contents of the false representation, and the identity of the party making the false statements and the consequences thereof."¹⁰ The purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based . . ."¹¹ Claims that arise under the KCPA are also subject to Rule 9(b)'s particularity requirement.¹² The elements of an action under the KCPA are identical to an action for fraud except for the intent requirement.¹³

Defendants allege that plaintiff has failed to specify the time and place of the alleged false

¹⁰*Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (citing *Lawrence v. Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991)).

¹¹*Koch*, 203 F.3d at 1236-37 (citation omitted).

¹²*Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1524 (D. Kan. 1995).

¹³*Id.*

misrepresentations. However, in light of plaintiff's Amended Complaint, which was filed on August 12, 2004, defendants' motion has been rendered moot. Any alleged defects in plaintiff's Complaint have been remedied. Plaintiff has established that the alleged false representations were communicated during August and September of 1999 as well as June, July, and August of 2000. Plaintiff has also established that these representations were made over the telephone and through the mail. Consequently, plaintiff's Amended Complaint satisfies the "who, what, where, and when" of the alleged fraud and KCPA violations.¹⁴ Defendants' Motion to Dismiss Counts I and II is denied.

C. Motion for More Definite Statement - Negligent Misrepresentation

Defendants also allege that plaintiff should be required to make a more definite statement of Count III, negligent misrepresentation. Pursuant to Federal Rule of Civil Procedure 12(e), a party may move for a more definite statement to remedy a pleading which is so vague that the party can not reasonably frame a response.¹⁵ Negligent misrepresentation occurs where, "[o]ne who, in the course of [business], supplies false information for the guidance of another person in such other person's business transactions."¹⁶ The person who supplied the false information is liable for damages suffered by such other person caused by reasonable reliance upon the false information if: (1) the person supplying the false information failed to exercise reasonable care or competence in obtaining or communicating the false information; (2) the person who relies upon the information is the person or one of a group of persons for whose benefit and guidance the

¹⁴*See, e.g., Ramada Franchise Sys., Inc. v. Tresprop, Ltd.*, 188 F.R.D. 610, 612 (D. Kan. 1999).

¹⁵Fed. R. Civ. P. 12(e).

¹⁶PIK-Civil 3d 127.43.

information is supplied; and (3) the damages are suffered in a transaction that the person supplying the information intends to influence or in a substantially similar transaction.¹⁷ A negligent misrepresentation claim may only be based on a misrepresentation of a present fact, not a future event.¹⁸

All of the misrepresentations alleged in plaintiff's Amended Complaint involve present facts, such as whether the investments were suitable, registered, and within the scope of approved products. Plaintiff alleges that John Schmidt, in the course of his actions as an agent, failed to exercise reasonable care in obtaining or communicating information about the securities to plaintiff. Plaintiff also alleges that he purchased the IMA securities in reliance on Schmidt's representations and that plaintiff was the person for whose benefit and guidance the information was supplied. Plaintiff has specified the time and place of the alleged misrepresentations in the Amended Complaint and, therefore, has sufficiently pled the elements of negligent misrepresentation. The Court must deny defendants' request for a more definite statement.

IT IS THEREFORE ORDERED BY THE COURT that Defendants' Motion to Dismiss and for a More Definite Statement (Doc. 3) is denied.

IT IS SO ORDERED.

Dated this 5th day of October 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Court

¹⁷*Id.*

¹⁸*Indy Lube Invs., L.L.C. v. Wal-Mart Stores, Inc.*, 199 F. Supp. 2d 1114, 1123 (D. Kan. 2002) (citations omitted).